Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-910

STEPHEN HOROWITZ,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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Petitioner, STEPHEN HOROWITZ, petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, in this case, entered on July 17, 1979.

Opinions Below.

The opinion of the California Court of Appeal, Second Appellate District, is not reported. The denial of petition for hearing in the Supreme Court of California is not reported.

Jurisdiction.

The judgment of the California Court of Appeal, Second Appellate District, was entered on July 17, 1979. A petition for hearing in the Supreme Court of California was denied on September 12, 1979. The jurisdiction of this Court was invoked under 28 U.S.C. §1257(3).

Questions Presented.

Whether, under the ruling of this Court in *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 (1971) search without a warrant was unreasonable, in that no exigent circumstances existed at the time of the search, and therefore, evidence seized thereby should have been excluded from the trial court.

Statement.

Petitioner was found guilty of possession of marijuana for purpose of sale (violation of California Health and Safety Code §11359(a)), after he entered a plea of guilty and after a denial of his motion to suppress seized evidence under §1538.5 of the California Penal Code. Proceedings were suspended, and Petitioner was placed on probation.

On the night of April 26, 1977, at approximately 8:30 p.m., Petitioner's vehicle, a 1977 Ford, was halted on a Venice, California, street by two "plain clothes", Los Angeles City Police Officers (Officers Soman and Tyndall).

He was stopped due to alleged traffic violations (*i.e.,* running a red light and speeding). Officer Soman later testified that he intended to determine whether the driver of the vehicle was under the influence of drugs or liquor, and if not, to issue the driver a warning.

The petitioner presented his driver's license to the officers. Officer Soman inquired as to the automobile registration and was informed that it was in the glove box. The officer, without petitioner's consent, entered the car and retrieved the rental agreement from the glove box.

While in the automobile, the Officer observed seeds on the floorboard and testified that he smelled a strong odor of marijuana emanating from the rear of the vehicle.

Officer Soman then asked Petitioner for the trunk keys. At first Petitioner agreed, but then, he took the keys from the Officer and told him that he would not consent to any search.

Officer Soman testified that, based upon the smell inside the vehicle, he placed Petitioner under arrest. A marked police car arrived and Petitioner was taken to the police station. The trunk was opened at the scene without a search warrant first being obtained. Marijuana was discovered therein.

REASONS FOR GRANTING THE WRIT.

In *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 (1971), this Court stated that "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." 403 U.S. at 462, 91 S.Ct. at 2035. Rather, search of an automobile without a warrant must be supported not only by probable cause, but also, by one of the recognized exceptions to the warrant requirement.

Three of the accepted exceptions to the warrant requirement, where automobiles are involved, are the "fleeting target" exception (*Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975), the "public safety" exception (*Cady v. Dombrowski,* 413 U.S. 1074), and "search incidental to arrest" (*Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034).

In the instant case, *Cady, supra,* is inapplicable. There is no allegation that a dangerous weapon or emergency was involved. Thus, *Cady* would not serve to justify a warrantless search in this case.

Also, *Chimel* does not justify the search authorities made in this case. In that case, the Court limited warrantless searches to circumstances incident to arrest. Furthermore, said search could only be conducted of Defendant's person or the area within his immediate reach to prevent his obtaining a weapon or destroying evidence.

In this case, although the search was incident to arrest, the search of the trunk was not of an area where Defendant could reasonably be expected to have access to gain a weapon or destroy evidence. Therefore, *Chimel, supra,* does not apply.

Finally, in *Chambers, supra,* this Court held that, often where an automobile is involved, "the opportunity

to search is fleeting since a car is readily movable . . . Where this is true . . . either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search." 399 U.S. at 52.

In the present case, as in *Coolidge, supra,* the *Chambers* justification is inapplicable. In neither case is the "fleeting target" rationale viable. In *Coolidge, supra,* the authorities had Defendant's vehicle under surveillance for an ample period of time. During this period, Defendant had given no indication that he intended to flee. He was arrested in his house with no access to the automobile. A warrant to search the automobile could and should have been obtained.

In this case, Defendant had been placed under arrest. There was no hint of accomplices conspiring to hijack the automobile from police custody. There were additional police units on the scene. The authorities could have held the vehicle until a search warrant was obtained.

The fact that probable cause was present is not in itself determinative. Defendant's automobile was in no way a "fleeting target". Following his arrest, he had no access thereto. Therefore, search without a warrant was not justified.

As recently stated in *Roaden v. Kentucky,* 413 U.S. 496, 93 S.Ct. 2796 (1973): "Where there are exigent circumstances in which the police action must be *now or never,* to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation". (Emphasis added) 93 S.Ct. at 2802. As shown hereinabove, the instant circumstances hardly presented a "now or never" situation. Defendant was in custody. The policy had ample opportunity to obtain

a search warrant. Failure to do so violated this Court's holding in *Coolidge, supra.*

At this late date, *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, and *Chambers, supra,* do not stand unexplained. Therefore, under this Court's holding in *Coolidge, supra,* the California Court of Appeal was in error in affirming the trial court's admission of evidence seized by said warrantless search.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF HOWARD ALLEN LEVY,
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Attorney for Petitioner.

Of Counsel:
HOWARD ALLEN LEVY.

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Appendix to
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APPENDIX A.

Opinion of the District Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

The People of the State of California, Plaintiff and Respondent, v. Stephen Horowitz, aka Stephen Gurivich, Defendant and Appellant. 2D Crim. No. 33574, (Super. Ct. No. A075975).

Filed: July 17, 1979.

Following a plea of guilty Stephen Horowitz, aka Stephen Nicholai Gurivich, was convicted of possession of marijuana for purpose of sale (Health & Saf. Code, § 11359). He appeals from the judgment (order grant-

ing probation) seeking review of the order denying his suppression motion. He contends: I. Appellant's detention was improper. "II. The entry of Officer Soman into the vehicle without a warrant and without probable cause to search said vehicle, allegedly to obtain the registration was invalid and the fruits of said entry must be suppressed from evidence. III. There was no probable cause to justify the search of the trunk of the appellant's vehicle. IV. The search of the trunk of the vehicle after appellant was safely in police custody, without any exigent circumstances, and without a warrant or consent was invalid; therefore the contraband seized from the trunk must be suppressed from the evidence."

The evidence introduced at the suppression hearing establishes that at approximately 8:30 p.m. on April 26, 1977, plainclothes Los Angeles City Police Officers Eugene Soman and Brian Tyndall were in an unmarked vehicle when they saw appellant's car fail to stop for a red light.

The officers followed appellant's automobile as it drove 45 miles per hour in a residential area, and decided to stop the car to ascertain whether appellant was under the influence of drugs or alcohol. Appellant pulled over to the curb, exited his vehicle, approached the officers, and said his name was "Stephen Horowitz." When Officer Soman asked for his driver's license, appellant presented a Florida license in the name of "Stephen Gurivich." The officer thereupon requested the vehicle registration. Appellant explained he had a rental contract for the car and gave the officer permission to retrieve it from the glove box.

Officer Soman entered the car, took the contract from the glove compartment and observed it bore the

name "Martin Horowitz." He also observed marijuana seeds and debris on the car's floorboard and detected a very strong odor of marijuana, stronger than consistent with that small amount of debris. Since the odor seemed to be coming from the rear of the car, Officers Soman and Tyndall looked in the area of the back seat. They noticed the odor was stronger there and seemed to emanate from the trunk. Officer Soman asked appellant if he could look into the trunk. Appellant said, " 'Sure. Go ahead,' " and handed him his keys. When the officer started to walk toward the trunk, appellant changed his mind, grabbed his keys and told Officer Soman he would need a warrant to search the trunk. Appellant was arrested and taken to the police station by fellow officers.

Thereafter, based on Officer Soman's belief that the trunk contained marijuana,[1] he opened it and observed therein an open brown shopping bag containing two one-pound plastic baggies of marijuana and a partially sealed large "rubber raft" like wrapper containing 230 pounds of marijuana.

Appellant testified in his own behalf; denied commiting traffic violations, averred that he had himself removed the rental contract from the glove compartment and had given it to the officers; that upon refusing to consent to the search of his trunk he had been

[1]The court: "The amount of marijuana, the closed area in which it was contained, some of which was not contained within the poly-vinyl-type wrappers, to begin with, all of that would lead, in my view, to a concentrated odor, as a matter of course, and could well support the statements of the officers that they smelled a heavy concentration of marijuana coming from the rear of the trunk, and under the cases, as I read them, it would support the entry if, in fact, that odor had been properly observed from within the vehicle."

arrested and removed to the station; that thereafter his trunk had been searched and the marijuana found therein seized.

Appellant's contention that his detention was unlawful is without merit. "Preliminarily, we note that in a suppression proceeding under section 1538.5, the power to judge the credibility of the witnesses, to resolve any conflicts in the testimony, to weigh the evidence, and to draw factual inferences is vested in the trial court. On appeal, all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence. [Citation.]" (*People v. Podesto* (1976) 62 Cal.App.3d 708, 715.)[2]

Here the officers were fully justified in stopping appellant for the traffic violations committed in their

[2]The court: "I think they had a right—I am going to resolve that there was a right to stop the vehicle under the circumstances for which the testimony was given. [¶] If Officer Soman did enter that vehicle for the purpose of obtaining the leasing contract, then what followed was a natural and proper development and would lead to a denial of this motion. [¶] If, indeed, Mr. Horowitz entered that vehicle and obtained a leasing contract, then the observations as to what occurred—as to what was present in the trunk, at least as set forth by the officers—the issue is, who entered the car and got the contract? . . . The Court believes that the proper interpretation of the evidence—and it is a close issue, I concede that—is that the officer did enter the vehicle. It would seem to be that unless he did that, the odors would not have been apparent to him, as was testified to, as emanating from the rear of the trunk, and for that reason, and for other reasons which I am not going to belabor the record with, the Court is of the view, at this time, that the motion to suppress under 1538.5 must be denied."

presence. (*People v. Podesto, supra,* at 715.) An officer may require the driver to identify himself, produce his driver's license and the registration certificate for the vehicle and question the driver regarding the violations observed. (Ibid.)

Likewise without merit is appellant's contention that Officer Soman's entry into his vehicle was improper. The court expressly credited the officer's testimony that appellant told him the vehicle rental agreement was in the glove box and gave him permission to retrieve it. Having obtained appellant's consent to retrieve the contract from the glove box, Officer Soman was in a place where he had a right to be when he observed the marijuana seeds and debris on the floor of the vehicle and smelled the strong odor of marijuana.

Although appellant contends the search of his trunk was unlawful, substantial evidence supports the trial court's express determination that the officers had reasonable cause to believe that contraband was, in fact, concealed there. (*Wimberly v. Superior Court* (1976) 16 Cal.3d 557, 564, 568, 569, fn. 6; *People v. Cook* (1975) 13 Cal.3d 663, 668, 670; and see *People v. Superior Court (Peck)* (1974) 10 Cal.3d 645, 650; *Mann v. Superior Court* (1970) 3 Cal.3d 1, 7.)

Lastly, "[i]t is . . . manifest that 'when there is probable cause to believe that an automobile stopped on a highway contains contraband, evidence of a crime,

or was itself an instrumentality of the commission of one, law enforcement officers need not obtain a warrant before conducting a search . . . . .' [Citations.]" (*Wimberly v. Superior Court, supra,* at 563.) The marijuana disclosed thereby was properly seized.

The judgment (order granting probation) is affirmed.

NOT TO BE PUBLISHED

/s/ Compton, *J.*
COMPTON

We concur:

/s/ Roth, *P. J.*
/s/ Fleming, *J.*

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Sept. 12, 1979

I have this day filed Order HEARING DENIED.

In re: 2 Crim. No. 33574 People vs. Horowitz.

Respectfully,

G. E. BISHEL
Clerk

79-910

Supreme Court, U. S.
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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED

By its letter of January 28, 1980, the court requested a response without specifying any particular issues. The following question is raised by petitioner:

> Whether the California Court of Appeal, Second Appellate District, improperly upheld a warrantless search of an automobile upon grounds of exigent circumstances.

STATEMENT OF THE CASE

In an information filed in Case No. A-075975 by the District Attorney of Los Angeles County, State of California, appellant was charged with possession for sale of marijuana, a violation of California Health and Safety Code section 11359(a). (CT 10.)[1]

Appellant pleaded not guilty. (CT 11.) Appellant's motion pursuant to California Penal Code section 1538.5 was denied. (RT 59.)

Appellant withdrew his plea of not guilty. He pleaded guilty as charged after he and counsel waived his constitutional rights. (CT 4-8, 61.)

Criminal proceedings were suspended. Probation was granted for a period of three years upon terms and conditions including that appellant spend the first six months in county jail. Appellant was given credit for three days previously served. Appellant was given a stay of execution of the county jail sentence only pending appeal. (CT 63.)

The appeal was from the judgment of conviction. (CT 64.)

On July 17, 1979, in an opinion ordered not to be published, the Court of Appeal of the State of California, Second Appellate District, Division Two, affirmed the judgment. (Appen. A to Petn.)

On September 12, 1979, the California Supreme Court denied a petition for hearing. (Appen. B to Petn.)

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[1]"CT" refers to the "Clerk's Transcript" of the trial court proceedings which was included as part of the record before the California Court of Appeal, Second Appellate District.

This opposition of respondent is filed pursuant to the Court's request contained in its letter of January 28, 1980.

STATEMENT OF FACTS [2]

Eugene Soman, a Los Angeles City Police Officer assigned to Venice Team I, was working with Officer Brian Tyndall on April 26, 1977, at approximately 8:30 p.m. as part of a special unit to suppress robberies. They were in plain clothes and in an unmarked vehicle. Officer Soman was driving the vehicle at Lincoln Boulevard and California Avenue when his attention was drawn to a yellow 1977 Ford LTD because the vehicle failed to stop for a red tri-light signal as it went through the intersection in the number two southbound lane nearly colliding with another vehicle, then completing a right turn proceeding westbound on California Avenue. (RT 3-4.)[3]

At the same time Officer Soman was on California Avenue approaching the intersection there were vehicles between the unmarked police car and the yellow Ford. (RT 4-5, 39-40.) The officer observed an older vehicle brake to avoid hitting the southbound yellow Ford. (RT 5, 39-40.)

The yellow Ford turned right to proceed westbound on California. Officer Soman then proceeded to go around

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[2]This is the Statement of Facts from the motion to suppress evidence pursuant to California Penal Code section 1538.5 on the grounds of violation of petitioner's Fourth Amendment rights. Because the conviction in the instant case was pursuant to a guilty plea, no other statement of facts will be included herein.

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[3]"RT" refers to the Reporter's Transcript of the trial court proceedings which was included as part of the record before the California Court of Appeal, Second Appellate District.

the older vehicle in order to follow the yellow Ford. The approximate speed of the 77 Ford LTD was 45 miles per hour as clocked by Officer Soman for 30 seconds for a quarter of a mile although this was a residential area. (RT 6-7, 39-30.)

Officer Soman stopped the vehicle in the 600 block of California Avenue. He did so in order to ascertain whether the driver was under the influence of something which would impair his driving and place the children and others in jeopardy. (RT 7, 18-19.)

To attract the driver's attention, Officer Soman had turned on the red light on the car and sounded the horn. The Ford pulled to the curb whereupon Officer Soman stopped behind the Ford. The officer approached the Ford's driver who had already exited his vehicle and was only a few feet from the front of the police vehicle. (RT 18, 40-41.)

The driver was appellant who was alone. He asked if he had done anything wrong. Officer Soman asked for appellant's driver's license whereupon appellant produced a Florida license. There was a brief discussion of the violation. (RT 9, 26, 40-41.)

Prior to asking for the license, Officer Soman asked appellant for his name and he had said "Stephen Horowitz." (RT 10-11.) The name on the Florida driver's license then provided by appellant was Stephen Gurivich. (RT 11.) When Officer Soman asked for the vehicle's registration, appellant said it was in the glove box. Officer Soman asked if he, Officer Soman, could get the registration of the vehicle and received an affirmative response.[4] He went into the glove box area through the driver's door and pulled out the registration to the vehicle. (RT 12, 41.)

Officer Soman took the registration and observed that it was registered to a rental agency. He looked at the rental agreement which bore the name of "Martin Horowitz." (RT 13.)

At the same time Officer Soman had entered the vehicle, he entered on the driver's side to obtain the registration. While examining the registration he observed some seeds and a little leafy substance on the floorboard of the driver's area. He noticed the familiar odor of marijuana. The officer could accurately recognize the odor of marijuana. The odor of marijuana was a much stronger odor than could be generated by the small amount of debris observed on the floorboard. The odor seemed possibly to be coming from the rear of the vehicle. (RT 14-15.)

Officer Soman informed his partner of the marijuana debris and odor and the status of the registration and then approached appellant who was standing on the sidewalk to the vehicle's right rear. The officer asked appellant if he could look into the trunk of the vehicle. He said, "Sure. Go ahead," and handed the keys to the officer. Officer Soman walked toward the trunk of the car and took the keys out of his hand. (RT 16, 42-44.) Officer Soman took the keys back whereupon appellant asked if Officer Soman had a

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[4]There is no basis in the record to support petitioner's statement at page 2 of the petition that the officer retrieved the rental agreement without consent. In fact, the version of petitioner and defense witness Wilgus was that appellant retrieved it. (RT 109, 143.) This latter version must be rejected as conflicting with that of Officer Soman which the trial court accepted on appeal. (See *The Hypodame v. Chapin,* 6 Wall 216, 224-225, 18 L.Ed. 794, 796 (1868).)

warrant and that he did not want the officer to look in there. (RT 17, 44-45.)

The officer believed, based upon the odor, that the trunk contained marijuana. A marked police vehicle arrived at the scene and took appellant to the police station. On that basis, the trunk was ultimately opened at the scene. (RT 17.)

When the trunk was opened by Officer Soman, Officer Soman observed a brown shopping type bag from which the odor seemed to be emanating, with a lot of marijuana in it. It was People's Exhibit 3, closed at the top and laying in the trunk. Also seen in the trunk was a large rubber-type bladder or cell, a large rubber bag. (RT 17, 30, 45.) It appeared to be a four-man rubber life raft. (RT 18, 46.) There were also contained within the trunk six large bales of marijuana with an approximate weight of 230 pounds. (RT 18, 46-47.)

Officer Soman did not recall civilians coming up to the scene after the stop. (RT 32-33.)

Officer Tyndall also had occasion to notice, when inside the vehicle, the strong odor of marijuana. (RT 34-35.) There was also a strong odor of marijuana emanating from the trunk. (RT 35.) He saw the debris on the driver's area of the floorboard. (RT 35.) He and Officer Soman searched the rest of the inside of the car but found nothing sufficient to cause the odor which seemed to come from the trunk. (RT 35.)

When the two officers were later leaving the area, a boy of 16 years, approached. (RT 47.) Officer Tyndall recalled that he said he lived there and wanted to know what had transpired. (RT 48.) No vehicle had stopped when the transaction occurred. (RT 48.)

Elsie Ellis, the court clerk, could smell the odor of marijuana emanating from People's Exhibit 3 which was located a few feet away. She was familiar with the odor of marijuana in her capacity as a county clerk. (RT 69-71.)

The bailiff in the court also smelled marijuana rather than rubber. (RT 74.)

A John Burgess present in the courtroom smelled rubber rather than marijuana. (RT 79.)

Officer Phillip Flanders of the Los Angeles Police Department had been a narcotics investigator for the past eight years. (RT 88.) Prior to that time he had training in narcotics at the Los Angeles, Police Academy. He made several hundred arrests in the area of marijuana. He had seen it growing, harvested and used. (RT 89.)

Officer Flanders saw the marijuana in People's Exhibit 3 when it was brought to Venice Police Station a year before on April 26, 1977. It was moister at that time. As marijuana dries, it loses its strong odor. (RT 90.) Officer Flanders could smell the marijuana odor of People's Exhibit 3 at Venice Station. (RT 94.)

DEFENSE

Wendy Wilgus of 937 Ninth Street in Santa Monica testified that she had known appellant for three years as of April 26, 1977. In the early evening hours of that date she was driving down Lincoln Boulevard when she saw Stephen coming out of Pico News. She pulled over, greeted him and asked if she could pick up her makeup bag which was at his house. She followed him home. He was driving a Ford LTD and she drove a white Volkswagen squareback station wagon. They traveled down Lincoln Boulevard to California Street where they stopped for a light. (RT 106.)

The light turned green and appellant had to brake instead of making the right turn he planned. Appellant and Wilgus then made the right turn and appellant then passed the car which had cut him off. After several blocks the car which cut them off pulled appellant over. The car had a red light but she did not know it was a police car. She parked on the first available street past appellant's car and got out. (RT 107.) She wanted to keep an eye on her car because she was parked in an alleyway so she stood on the corner and watched. (RT 109.) In a few minutes, she saw appellant enter his car and reach over to the glove box area. He then left the car and spoke to the officers. (RT 109.)

Then Officer Tyndall struggled for something in appellant's hand, pushed appellant away and then handcuffed him. (RT 110.) She then drove to a friend's house and returned to see him taken away. The trunk of the car was closed. (RT 110-111.)

Appellant testified that "Gurivich" was the Russian translation of his name and he used it in his screenwriting and other jobs. (RT 137.)

On April 26, 1977, he pulled in front of the Pico News Agency and as he returned to his car, he saw Wendy pull up. He wanted her to follow him home where he would give her bag to her. They proceeded down Lincoln to California. (RT 139.) As he proceeded to turn right on California, a yellow Plymouth or an AMC Satelight "shot" through the intersection, whereupon he had to slam on his brakes. Wendy was directly behind him in her car. (RT 140.)

He then turned and followed the yellow Plymouth which was proceeding at 5 miles per hour. He then passed the Plymouth at 23 miles per hour, making a sign of disapproval at the officers. He saw the red light and

realized that the occupants of the Plymouth were police officers. (RT 141-142.) They stopped him and asked for his license. (RT 142.)

Appellant asked if something was wrong and the officers said, "Yes. You almost hit us back there at the light." Appellant told them they almost hit him. (RT 143.) They asked whose car it was and when he told them it was an Avis rental, they asked to see the agreement. Appellant obtained it from the glove box and showed it to them. They asked why it bore the name "Horowitz" and he showed them that it was only the credit and stamp, the name in handwriting was "Gurivich." (RT 143.)

They asked him to open the trunk and he asked why. They said it was a heavy narcotics area and they wanted to check his car. The conversation went back and forth and finally they said, "If you don't let us look in your trunk, we are going to take you downtown." They insisted he was detained, not under arrest. He was nervous whereupon the officer said, "Let me have your keys." He reached for the keys and, finally, Officer Soman pulled the keys from appellant's hand while Officer Tyndall handcuffed him. He was taken to a black and white unit which arrived. He noticed Officer Soman looking around appellant's car which he had not yet entered. (RT 145.)

David Evans testified that he was a senior designer for Avon Inflatables Limited of South Wales in the British Isles. He developed the rubber life rafts which have a life of ten years. If such a raft is not serviced anually, the materials rot and the odor is "really pungent." (RT 169.) Mr. Evans recognized the roll up cover found in the trunk over the marijuana to be made of PVC, poly-vinyl-chloride, the same material of which Avon products are made. The bag was, however, not an Avon product. (RT 169-171.) If something with a strong pungent odor were

sealed inside of the cover up, no odor would be detectable. (RT 172.)

Belinda Palmer testified that she lived at 618 Mildred Avenue in Venice and on April 26, 1977, at approximately 8 p.m. her friend Wendy Wilgus arrived at her home. Wendy appeared upset and said, "Stephen is in trouble." (RT 178.) They went back to California Street to see appellant in handcuffs. (RT 179.) The trunk of appellant's car was closed. (RT 180.)

REBUTTAL

Officer Tyndall smelled a very strong odor of marijuana when the trunk of the car was opened. He saw that the brown paper shopping bag was partially open. There was some loose debris in the mouth portion. (RT 185-186.) He moved closer to the bag at which time the odor of marijuana became stronger. (RT 186.) Then the officer went to the partially unsealed life raft. (RT 187.)

ARGUMENT

AN EXIGENCY EXISTED TO JUSTIFY A SEARCH OF THE TRUNK OF PETITIONER'S AUTOMOBILE WITHOUT A WARRANT

Petitioner contends that no exigency existed to support a search without warrant of petitioner's automobile. It is well established that all that is required to stop and search an automobile on the road is probable cause to believe it contains contraband. (*Carroll v. United States,* 267 U.S. 132, 151-153, 45 S.Ct. 280, 69 L.Ed. 543 (1952).) The fact that the vehicle is on the road and, therefore, could easily be moved or its contents hidden or destroyed constitutes an exigency justifying a warrantless search. (*United States v. Orozco,* 590 F.2d 789, 793 (9th Cir. 1979); *United States v. Trejo-Zambrano,* 582 F.2d 460, 462 (9th Cir. 1978), cert. denied; *Fierro-Soza v. United States,* 439 U.S. 1005, 99 S.Ct. 618 (1978).)

In the instant case, the exigent circumstances rendered the obtaining of a warrant an impossible or impractical alternative. Petitioner was stopped for driving through a red light and speeding on a busy street. He stopped the car at the curb. There were other vehicles and pedestrians on the avenue. (RT 3-7, 18-19, 39-41, 47.) It is interesting to note that a defense witness, Wendy Wilgus, testified that she was a friend of petitioner who fortuitously was following him home in a second car when he was stopped. (RT 106-109.) It is clear that exigent circumstances supported a warrantless search. Petitioner was transporting his contraband hurriedly when stopped on a busy street. The possibility of confederates locating and moving the vehicle was a very real one.

Petitioner's reliance upon *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) is misplaced. As the Court in *United States v. Trejo-Zambrano, supra,* stated at page 463, "Coolidge invalidated a warrantless search of an empty automobile which was parked in the driveway of the owner. The search occurred long after the police had cause, and when they had good reason to believe the automobile would not be removed." Exigent circumstances properly justified a warrantless search of petitioner's automobile in the instant case.

CONCLUSION

For the foregoing reasons, respondent urges that the petition for writ of certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on February 26, 1980, I served the within *Brief of Respondent* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.W.
Washington, D.C., WA 20543
(Hand delivered; forty copies)

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Clerk of the Superior Court for
the Hon. Bernard S. Selber
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Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 26, 1980 at Santa Monica, California.

Carrie Petrucci
(Original signed)

Suzanne Newman
(Original signed)